FADZIL MOHAMED NOOR

v.

UNIVERSITI TEKNOLOGI MALAYSIA

FEDERAL COURT, KUALA LUMPUR
RAJA AZLAN SHAH CJ (MALAYA)
ABDUL HAMID OMAR FJ
EUSOFFE ABDOOLCADER J
[CIVIL APPEAL NO. 128 OF 1980]
16 JUNE 1981

CIVIL PROCEDURE: *Summary judgment - Dismissal of Assistant Lecturer Universiti Teknologi Malaysia - Absent without leave - Validity of dismissal - Ultra vires - Principle of master and servant not applicable - Status supported by statute.*

The appellant who was an assistant lecturer at the University (the respondent) took an extension of leave without approval from 26 June 1978 - 10 July 1978 to participate in the general elections. The Disciplinary Committee requested the appellant to show cause and a written explanation was duly given by the appellant. The University Council by a letter terminated the appellant's services with effect from 15 February 1979.

The question of whether or not the purported dismissal was validly made was the substance of the question raised in this appeal.

The whole matter was dealt with by the Disciplinary Committee purporting to act as the delegate of the University Council. Thus the question arises whether the disciplinary authority was vested in the University Council and whether the Council had power to delegate and did in fact delegate it to the Disciplinary Committee by virtue of s. 16A of the Universities and University Colleges Act 1971 (Act 30 of 1971).

The plaintiff commenced an action in the High Court for a declaration that the purported dismissal by the respondent was *ultra vires*, illegal and void and that he was entitled to be paid his salary and all emoluments as from the date of the purported dismissal. He then unsuccessfully applied for summary judgment. This is an appeal against the refusal.

The meaning and effect of ss. 7(1) and (2), ss. 16A and s. 6 of Act 30 of 1971 and ss. 4(1) and (16) of the University Constitution were considered by the Federal Court.

It was argued that since there were no disciplinary rules gazetted at the material time prescribing the procedure to be followed by the Disciplinary Committee, the Disciplinary Committee could not take action and therefore the power of dismissal was vested in the University Council which could dismiss the appellant under the master and servant principle.

Held:

[1] The University Council may exercise all powers conferred on the University by Act 30 of 1971 or the Constitution "unless otherwise expressly provided by this Act or Constitution" (s. 7(2) of the Act). The general powers of the Council do not by virtue of s. 16A of the Act extend to disciplinary matters. Such matters are conferred on and vested in the Disciplinary Committee alone (s. 16(5) of the Act). Therefore the purported dismissal by the University Council was *ultra vires* its powers.

[2] This principle was not a straight forward case of master and servant and is inapplicable in the present case. The appellant as an Assistant Lecturer had a status supported by statute and was entitled to the protection of a hearing before the appropriate disciplinary authority including a right of appeal to the Council. When that right is violated the Court may allow declaratory relief to enable the retention of employment and emoluments from the date of dismissal.

[3] In O. 14 cases if a point under an Act is arguable the Court has the same duty in cases depending on interpretation of statutes as in other cases. In the Court's view of the constitution of Act 30 of 1971 and the University's Constitution, the University had a hopeless case. Therefore no useful purpose would be served in going to trial.

[Appeal allowed.]

Cases referred to:
Attorney-General v. Leeds Corporation [1929] 2 Ch 291
Public Textiles Bhd. v. Lembaga Letrik Negara [1976] 2 MLJ 58
Ridge v. Baldwin [1964] 2 All ER 865
Malloch v. Aberdeen Corporation [1971] 2 All ER 1278
Esso-Standard Malaya Bhd. v. Southern Cross Airways (M) Bhd. [1972] 1 MLJ 168

Legislation referred to:
Universities and University Colleges Act 1971 (Act 30 of 1971), ss. 6, 7(1), (2), 16A
Constitution of University Technology Malaysia, ss. 4(1), (16)

For the appellant - Peter Mooney (M/s. S.S. Jegathesan with him); M/s. Syed Ibrahim & Co.
For the respondent - V. George; M/s. Zain & Co.

JUDGMENT

Raja Azlan Shah CJ (Malaya):

This appeal is against the judgment of the learned Judge dismissing an application by the plaintiff (appellant before us) for summary judgment in an action brought by the appellant against the Universiti Teknologi Malaysia (respondents before us) for a declaration that the purported dismissal by the respondents (whom we shall call "the University") of the appellant was *ultra vires*, illegal and void and that the appellant is entitled to be paid his salary and all emoluments as from the date of the purported dismissal.

The appellant was during the material period an Assistant Lecturer employed by the University. He was granted leave for period 21 to 24 June 1978, for the purpose of participating in the General Election. As he found the period insufficient he sent a telegram requesting for extension of leave which request was refused. Unfortunately, the letter refusing the leave was never received by the appellant but nevertheless he proceeded to go on leave without approval. On 13 July 1978, the secretary of the disciplinary committee wrote a letter to the appellant to show cause in writing why disciplinary action should not be taken against him. On 25 July 1978 he replied giving his explanation. After a period of 8 months the appellant received a letter dated 13 February 1979, stating that the University Council at its meeting held on 22 January 1979 considered the decision of the disciplinary committee on the complaint regarding the appellant's absence without leave and the University Council decided to terminate his employment with effect from 15 February 1979. We reproduce excerpts of the said letter:

Encik Fadzil bin Mohd. Noor, Pusat Pengajian Kemanusiaan, Universiti Teknologi Malaya.

Tuan,

Adalah dimaklumkan Majlis Universiti Teknologi Malaysia telah pun mengadakan satu Mesyuarat Khas pada 22 Januari 1979, bagi menimbangkan perakuan yang dikemukakan oleh Lembaga Jawatankuasa Tatatertib mengenai tuduhan bahawa tuan telah mengengkari arahan pihak Universiti dan seterusnya tidak hadir bertugas tanpa kebenaran daripada 26 Jun hingga 10 Julai 1978.

...

Setelah mengkaji perkara ini dengan teliti Majlis telah mendapati bahawa adalah sabit kesalahan tuan terhadap tuduhan mengengkari arahan pihak Universiti dan seterusnya tidak hadir bertugas tanpa kebenaran daripada 26 Jun 1978, hingga 10 Julai 1978.

... Oleh demikian dengan sabitnya kesalahan tuan itu Majlis berpendapat tidaklah ada jalan lain yang sesuai diambil melainkan tuan dibuang kerja. Dengan itu inilah di-maklumkan bahawa tuan adalah dibuang kerja oleh Majlis Universiti Teknologi Malaysia mulai daripada 15 Februari 1979.

Yang benar,

Sd. (Ainuddin bin Abdul Wahid)

Naib Cansellor.

b.p. Majlis Universiti Teknologi Malaysia.

On 17 July 1979, the appellant filed a specially endorsed writ in which he asked for a declaration mentioned above. On 8 August 1979, he unsuccessfully applied by way of summons-in-chambers for summary judgment in terms of the statement of claim.

The argument on the appeal ranged over wide matters, but as it developed it became apparent that the appeal should be disposed of on a ground relating to *ultra vires* and that it was unnecessary to call on Counsel to argue other issues.

The question of whether or not the purported dismissal was validly made is now in substance the question raised in this appeal.

It is plain from the course of events, as set out in the judgment of the learned Judge, that the whole matter was dealt with by the disciplinary committee, purporting to act as the delegate of the University Council. Thus the question arises whether the disciplinary authority of the University in respect of a member of the staff was in law a delegated power of the disciplinary committee. The learned Judge seems to think that the disciplinary authority is vested in the University Council and that the Council had power to delegate and did in fact delegate it to the disciplinary committee by virtue of s. 16A of the Universities and University Colleges Act 1971, (Act 30 of 1971). He found some support for this conclusion in the language of subsection (5) of s. 16A of the Act which provides for the right of appeal of any person dissatisfied with the decision of the disciplinary committee to the University Council and which he construed as not restricting the power of the University Council to appoint or dismiss officers and staff of the University as conferred by its Constitution. Section 4(1)(m) and s. 16 of the Constitution of the University were also referred to and applied. The difficulty in the way of this conclusion is that it finds no support from the language used in the Act or Constitution.

We are of the view that this appeal turns ultimately, and we think exclusively, on the proper meaning and operation of ss. 7, 16A and 16C of Act 30 of 1971 and s. 4(1)(m) and s. 16 of the Constitution of the University. We reproduce the relevant provisions in some detail:

> Section 7(1) upon the coming into force of the Incorporation Order ... a University ... established ... and shall be deemed to have been constituted a body corporate ... with full power and authority ...
>
> (e) to exercise, discharge and perform all such powers, duties and functions as may be conferred or imposed on the University by this Act or the Constitution.
>
> (2) The powers conferred on a University by subsection (1) shall, unless otherwise expressly provided by this Act or the Constitution, be exercised by the University Council.
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> Section 16A(1) Subject to subsection (4), the disciplinary authority of the University in respect of every member of the staff, ... shall be the disciplinary committee of the University which shall consist of:
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> (a) the Vice-Chancellor; and
>
> (b) two members of the University Council elected by the University Council.
>
> (2) In the exercise of its disciplinary functions, the disciplinary committee shall have the power to take such disciplinary action and impose such disciplinary punishment as may be provided for under any disciplinary rules that may be made by the University Council under s. 16C ...
>
> (5) Any member of the staff, officer or employee of the University who is dissatisfied with the decision of the disciplinary committee or of any person or board delegated with functions, powers or duties under subsection (3) may appeal against such decision to the University Council which may give such decision thereon as it deems fit and proper.
>
> Section 16C(1) The University Council shall have the power to make such disciplinary rules as it deems necessary or expedient to provide for the discipline of the members of the staff, ...; the disciplinary rules made under this subsection shall be published in the *Gazette*...
>
> (3) The disciplinary rules made under this section shall create such disciplinary offences and provide for such disciplinary punishments as the University Council may deem appropriate, and the punishments so provided may extend to dismissal or reduction in rank in the case of members of the staff, officers or employees of the University, and expulsion from the University in the case of students of the University.

It may be noted the disciplinary rules, contained in a detailed and elaborate code which prescribes the procedure, which is fair and appropriate, to be followed when there is an allegation of a disciplinary offence, were gazetted only on 15 February 1979, (PU(A) 22/ 79), that is on the same day the purported dismissal was made by the University Council. Therefore at the material time there were no disciplinary rules, and as such, no known disciplinary offences created and no known disciplinary punishments provided.

The powers conferred on the University as defined in s. 7(1)(e) of Act 30 of 1971, are enumerated in s. 4 of the Constitution of the University (PU(A) 231 of. 1976): Subsection (1) reads:

> 4(1) The University shall, subject to the provisions of this Constitution, have the following powers:
>
> (m) to appoint, promote and discipline officers, teachers and staff of the University;

By virtue of the provisions of ss. 7(2) and 16A of the Parent Act, disciplinary powers under this provision of the Constitution are exercisable only by the disciplinary committee.

The powers of the University Council are contained in s. 16 of the Constitution. It reads:

> The Council shall be the executive body of the University, and may exercise all the powers conferred on the University, save in so far as they are by this Constitution or the Statutes, Acts and Regulations conferred on some other Authority or body or on some officer of the University: ...

This provision in the Constitution constitutes the University Council as the executive body of the University and not the disciplinary authority and must necessarily be limited in scope and read in the light of the relevant provisions of the enabling Act we have just referred to.

The University was incorporated under Act 30 of 1971. It is a corporate body, and as such it can only do such acts as are authorised directly or indirectly by the statute creating it: see *Attorney-General v. Leeds Corporation* [1929] 2 Ch 291. In *Public Textiles Bhd. v. Lembaga Letrik Negara* [1976] 2 MLJ 58 this Court said in relation to a corporation that whatever is not permitted expressly or by necessary implication by the incorporating statute is prohibited not by the express or implied prohibition of the Legislature but by the principle of *ultra vires.* Therefore the university authority can only act in pursuance of the powers given to it by law. It follows that it has to follow proper procedure as prescribed by law before condemning an erring member of the staff. If it goes outside its limit of operation, or is not warranted by it, then any decision made by it is *ultra vires.*

To elaborate somewhat, the University Council in the present case is the executive body of the University. It may exercise all the powers conferred on the University by Act 30 of 1971, or the Constitution. But such powers are circumscribed. Subsection (2) of s. 7 of the Act enacts "unless otherwise expressly provided by this Act or the Constitution." The general powers of the University Council do not by virtue of s. 16A of the Act extend to disciplinary matters. Such matters are conferred on and vested in the disciplinary committee alone. That committee must itself take the responsibility of deciding a disciplinary case, that is to say, the charge and the consequences of a positive finding upon it. The University Council's limited role in this matter is as an appellate body exercising judicial function for the determination of appeals from any decisions of the disciplinary committee. It is, therefore, obvious that the functions of these two bodies are separate and distinct. The Act deals with the situation in language which could scarcely be plainer. And it pointedly omits any reference to delegation. It prescribes the bodies who are to be the disciplinary authority and the appellate authority. Such being their respective jurisdiction, we are of the opinion that the purported exercise of jurisdiction by the University Council in dismissing the appellant was *ultra vires* its powers. The University Council was purporting to do the very thing which, by Act 30 of 1971 and the Constitution, it was prohibited from doing.

It was further argued that since there were no disciplinary rules at the material time and therefore no disciplinary action that could be taken by the disciplinary committee, the power of disciplinary dismissal was still vested in the University Council. As such the University Council could dismiss the appellant under the master and servant principle. In *Ridge v. Baldwin* [1964] 2 All ER 865 Lord Reid developed the point in an illuminating way. He said, *inter alia,* that in a pure master and servant case, dismissal is governed by the law of contract *inter partes* and there is no right to be heard. In other words, in a pure master and servant relationship, the principles of administrative law, including those of natural

justice have no part to play. The administrative law remedies, such as a declaration that the dismissal is *ultra vires* is not available; no order for reinstatement can be made. The most that can be obtained is damages, if the dismissal is wrongful. In *Malloch v. Aberdeen Corporation* [1971] 2 All ER 1278 Lord Wilberforce took that point to mean "cases in which there is no element of public employment or service, no support by statute, nothing in the nature of an office or a status which is capable of protection." In cases where such an element is present, Lord Wilberforce pointed out that "there may be essential procedural requirements to be observed, and failure to observe them may result in a dismissal being declared void." In that case the House of Lords held that a school teacher had a special status conferred on him by statute which converted him from being a public servant holding office at the pleasure of a public authority into a servant who, by virtue of his statutory position, had implied into that position the right to be heard Lord Wilberforce stated (p. 1294):

> The argument that, once it is shown that the relevant relationship is that of master and servant, this is sufficient to exclude the requirements of natural justice is often found. ... A comparative list of situations in which persons have been held entitled or not entitled to a hearing, or to observation of rules of natural justice, according to the master and servant test, looks illogical and even bizarre.

Lord Wilberforce's speech is important because it opens the way for there to be a general application of the principles of natural justice to the employment relationship.

Clearly this is not a straight-forward case of master and servant. The appellant as an Assistant Lecturer employed by the University, has a status supported by statute and is entitled to the protection of a hearing before the appropriate disciplinary authority, including the right of appeal to the University Council from the decision of that authority. If that right is violated, as happened here, then the Court may allow declaratory relief, enabling him to retain his employment, and continued eligibility to be paid his salary and all emoluments from the date of the purported dismissal. The point is, here, the appellant's employment had never been terminated. It would be open to the University at any time hereafter to dismiss him if it so chooses to do and does so in a lawful manner. Until it chooses to do that the appellant's contract of employment will continue. We find it hard to believe that in a field of employment such as the present, the Legislature can really be said to have intended that the appellant is *ipso facto* to be deprived of his employment without any regard for vested right. To say that there were no disciplinary rules under which he could be charged is an argument which has only to be stated to be rejected.

We now consider the application for summary judgment. It was rightly raised by Counsel for the University that the case turns on the interpretation of the provisions of Act 30 of 1971 and the Constitution of the University, and therefore the Court ought to be very cautious in treating it under O. 14. We are disposed to agree with that argument for this reason; not that cases depending on the interpretation of a statute or statutes deserve any different treatment from that of any other case under O. 14. An O. 14 order in the view we have always taken of it is a very stringent procedure because it shuts the door of the Court to the defendant. The jurisdiction ought only to be exercised in proper cases. If the University and University Colleges Acts and related legislation come into an O. 14 case, no greater attention in principle is to be given by the Court to that class of action than to any other class of action. The only point is that as everybody knows the pertinent legislation is long and complicated. But it is not sufficient under an O. 14 case to flourish the title of the University and University Colleges Act, etc., in the face of the Court and say that

is enough to give leave to defend. If a point taken under the Acts is quite obviously an unarguable point, and the Court is satisfied that it is really unarguable, the Court has precisely the same duty under O. 14 as it has in any other case. The Court has the duty to apply the rule: (see *Harry Tong Lee Hwa v. Yong Kah Chin* [1981] 2 MLJ 1).

In *Esso Standard Malaya Bhd. v. Southern Cross Airways (M) Bhd.* [1971] 1 MLJ 168, I pointed out that in an O. 14 case, where it turned on the construction of a few documents, and the Court was only concerned with what, in its judgment, was the true construction, there could be no reason to go formally to trial where no further facts could emerge which would throw any light on the documents that had to be construed. We think we can safely apply that principle to the present case. On the view we have taken of the construction of Act 30 of 1971, and the Constitution of the University, the University had an absolutely hopeless case. The only function of the Court is *jus dicere* and to ascertain the intention of Parliament from the words used in the statutes and nothing more. No useful purpose would then be served to go formally to trial.

We accordingly allowed the appeal.

Also found at [1981] CLJ 85